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HEARINGS

Before The

COMMITTEE ON PUBLIC WORKS

SUBCOMMITTEE ON AIR AND WATER POLLUTION

UNITED STATES SENATE

Discharge Permit

FEDERAL WATER POLLUTION ACT AMENDMENTS

Washington, D. C.

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MONDAY, AUGUST 2, 1971

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United States Senate,

Subcommittee on Air and Water
Pollution of the Committee on
Public Works,

Washington, D.C.

The Subcommittee met, pursuant to recess, at 10:00
a.m., New Senate Office Building, Senator Edmund S. Muskie
(Chairman of the Subcommittee) presiding.

Present. Senators Muskie, Eagleton, Boggs and Beall.

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Senator Muskie. The Subcommittee is in order.

We will talk about discharge permits. What this
piece of paper says, I will read it, and then we can ask
questions, that under the discharge permit program, which
is in the Committee print, existing standards, that means
under the 65 law.

Mr. Billings. Existing law, existing standards in the
65 law, and intra-state standards, that the states have
either developed, or will develop since that period of time.

Winter

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1 Senator Muskie. Existing standards will be implemented
2 by 1975, and under the new legislation, national water
3 quality and waste discharge inventory to be completed by
4 January 1, 1975.

5 State plans for National standards and exceptions by
6 January 1, 1974, and approved plans for national standards by
7 1980.

8 Now, what this seems to mean is that industries or
9 polluters will be required to gear up implementation of
10 present standards by 1975, knowing that they are going to have
11 to begin in 1975 to implement higher standards, is that
12 right?

13 Senator Boggs. Present standards would be those
14 presently in the law, not in the new standards we would
15 put in?

16 Senator Muskie. Presently in the law.

17 Senator Boggs. So to get a permit immediately this
18 year, they would have to gear up to the present standards,
19 okay.

20 Senator Muskie. Which means changing processes to the
21 extent that is required, controlling dischargers, and so on.

22 In other words, make all of the technological changes
23 the present standards require by 1975.

24 Mr. Billings. Basically, that means, Mr. Chairman,
25 that they would be implementing the toxic standards that

3 1 this bill would set, and they would be achieving secondary
2 treatment by 1975.

3 Senator Muskie. All of those are not in present
4 law?

5 Mr. Billings. But we are adding two new requirements
6 in other provisions of the law that they will have to do to
7 meet the toxic standards, and have to meet the present
8 treatment standards for the effluents that are not toxic,
9 and under the permit, they would have to achieve secondary
10 permit.

11 This is grandfathering in what is presently expected
12 of them with additions of present treatment standards.

13 It is under the permit program as presently proposed,
14 industries would have to meet secondary treatment and toxic
15 standards.

16 Mr. Jorling. Set administratively.

17 Senator Muskie. That is not in the present law.

18 Mr. Billings. It is in the present Refuse Act of the
19 program, as to toxic and secondary treatment.

20 Senator Boggs. That is part of the criteria right
21 now?

22 Mr. Billings. Yes.

23 Mr. Jorling. They have interpreted Refuse Act as
24 giving them complete authority over anything that is dis-
25 charged on an inferred kind of argument, that if it is complete

4 1 prohibition to discharge anything without a permit from the
2 Corps, then the Corps has the authority to say what can and
3 cannot go into the water, and they have made an administrative
4 judgment that toxics can be regulated out against some stand-
5 ard, that still is uncertain, and the other pollutants can
6 be regulated out to the extent necessary to treat water
7 quality standards, which by their own admission is a kind
8 of concept of secondary treatment.

9 Senator Muskie. Is the Administration taking the
10 position under the Refuse Act that the permits to be granted
11 under that Act is subject to state certification?

12 Mr. Billings. Yes.

13 Mr. Jorling. Yes.

14 But purely as one of the inputs of information that
15 they get, rather than any kind of a binding, or even less
16 than binding on the question of water quality, they just say
17 we get the state certification, and that is one of those things
18 we review in making judgment.

19 Senator Muskie. What happens if the state does not give
20 certification?

21 Mr. Billings. If the state positively denies certi-
22 fication, then a Refuse Act permit cannot be issued.

23 That is under existing law, Section 21.

24 Senator Muskie. Is the Administration accepting that
25 interpretation of existing law?

5 1 Mr. Billings. There is no doubt about it. It is
2 specific.

3 Senator Muskie. Do they say there is no doubt
4 about it?

5 Mr. Jorling. Yes.

6 Mr. Billings. Yes.

7 Mr. Jorling. With one exception, that the Federal
8 Power Commission, they interpret that as not being binding
9 on them, that they can go ahead and issue a Federal Power
10 license, notwithstanding the refusal of the state to issue.

11 Now they reach that conclusion.

12 Mr. Billings. The EPA and the Corps state they cannot
13 issue if the state acts to deny the permit.

14 Senator Muskie. That is something more than an
15 administrative act.

16 That is veto power.

17 Mr. Jorling. If they issue certification, the effect
18 of that issuance on the permit mechanism is just one of the
19 inputs they look at.

20 Senator Muskie. If the certification is simply as
21 to whether or not the proposed discharges is consistent with
22 water quality standard.

23 Mr. Jorling. That is correct.

24 Senator Muskie. So if they are not consistent, there
25 would be no certification, presumably.

1 Mr. Billings. That is correct.

2 Senator Muskie. They say if there is, then they are
3 consistent, they issue certification.

4 That is more than an input. That is a veto power.

5 Mr. Billings. Only on the negative side.

6 Senator Muskie. Under Section 21, they were not
7 intended to put a positive input.

8 What they were supposed to do, tell the Federal agency
9 that is involved whether or not the proposed permit was con-
10 sistent with water quality.

11 Mr. Billings. That is correct, but Section 21 was
12 primarily directed--

13 Senator Muskie. Whatever it envisioned, the states
14 would be exercising all of the authority we gave them in
15 21, would they not?

16 Mr. Jorling. Yes, I think the answer to that is yes,
17 but what has happened is that the Refuse Act came along, and
18 the permit to be issued thereunder, and the states have
19 issued a permit, which in the good states, let's limit to
20 those, they issue a certification which is basically the
21 state permit, like California, and then the Federal Government
22 gets an application from industries in California, and the
23 Federal Government gets a certification from the state,
24 but the issuance of another permit, which may or may not be
25 in conformance with the state permit, the Federal permit is not
bound by what the states say should be to achieve water

7 1 quality standards, so they review, and they issue a permit
2 based on their analysis, not on the state's analysis of the
3 water need and objective, so the end result would be a permit
4 from the State of California, and a permit from the Corps,
5 which may be out of phase.

6 Senator Muskie. The State of California can deny
7 certification, can they not?

8 Mr. Billings. Except the State of California certi-
9 fication comes at the first stage.

10 The Applicant has to come for a permit with a state
11 certification.

12 Once the state has certified, then the permit process
13 goes ahead, and it is after the state certification, that
14 these other agencies, these other examinations or decisions
15 are made.

16 Senator Muskie. How is the state going to certify
17 the quality effect of the discharge if it does not know what
18 the proposed discharge is, and that it will be controlled by
19 the Federal permit, it is going to be--

20 Mr. Billings. That is a very good question.

21 Mr. Jorling. That is the point they have raised.

22 Senator Muskie. The state can say that, can it not?

23 Mr. Billings. Yes, but that puts the state in a
24 position of making criminals out of all of its dischargers.

25 Senator Muskie. Why?

8
1 Mr. Billings. Because it says we do not know what you
2 are going to do to this permit, until after we certify, there-
3 fore, we cannot know what the requirements are going to be
4 on the permittee, therefore, we cannot certify.

5 Senator Muskie. Who under Section 21 requests the
6 state certification?

7 Mr. Jorling. The applicant.

8 Senator Muskie. The applicant?

9 Mr. Jorling. Yes.

10 Senator Boggs. Before he approaches the Corps?

11 Mr. Jorling. Yes.

12 Actually they are sending in a form to the Corps
13 of Engineers, which says either a certification is required
14 under 21(b), as attached, or it will be forthcoming.

15 Mr. Billings. Any applicant for Federal license or
16 permit shall provide, and so on.

17 Senator Muskie. That language is geared to the
18 concept that the application spells out the nature of the
19 discharge?

20 Mr. Billings. That is right.

21 Senator Muskie. That will not be the case here?

22 Mr. Billings. The difficulty is that Section 21 did
23 not envision a water quality permit.

24 It envisions for construction of water ways, FPC
25

1 licenses, where the state would know what is intended at the
2 time the applicant came forth.

3 Senator Muskie. Then you have got to change 21.

4 Mr. Billings. That is what this proposal is to do.

5 Senator Muskie. At what point under the proposal,
6 who solicits the state certification now?

7 Mr. Billings. The applicant would continue to
8 request certification.

9 Senator Muskie. At what point is the state to issue
10 certification?

11 Mr. Billings. The nature of the discharge would be
12 defined by the applicant.

13 The condition on that discharge would be imposed by the
14 state, and the administrators water quality responsibility would
15 be to review the certification to make sure it is consistent
16 with the planning of certification, not a series of ad hoc
17 judgments made unrelated to the water quality standard
18 program.

19 Mr. Jorling. By the Department of Interior for fish
20 and wildlife and the Department of Commerce for fish and
21 wildlife.

22 Senator Boggs. So the state would simply certify that it
23 would not violate plans to implement applicable water standards,
24 that is as far as you would go?

25 Mr. Jorling. Yes.

10 1 What we are trying to do here is in effect--

2 Senator Muskie. It seems to me that if the Federal
3 Government can change the character of the discharge, after the
4 state has certified the relationship of a proposed discharge,
5 the water quality standard, the state agency must have
6 another crack at it.

7 For what value is a certification as related to one
8 kind of discharge, if the nature of the discharge is subse-
9 quently changed?

10 Mr. Jorling. Under the staff proposal, the only
11 time the Federal Government would change what the state
12 has said is required to meet the standards, is where the
13 Federal Government, issued its plans where it has approved,
14 and says the state certification is consistent with that,
15 so it would be one review, not one of considerations here
16 in the calculation of whether or not the discharge should
17 have--

18 Senator Muskie. The first situation is before
19 the implementation plans, we are talking about the first
20 part of this memo here, not about the state certification
21 under the present law, including the Refuse Act.

22 Mr. Billings. But the language of the Act would
23 specify the basis on which the administrator would conduct
24 his review, A, compliance with the toxic effluent standard set
25 under Section 307, those are national effluent standards, B,

11 1 compliance with the present treatment standard, those are
2 Federal standards, or, C, the equivalent of secondary treat-
3 ment, of which is in this sense, because we have removed all
4 of these other categories of waste from it, it has a
5 relevancy, but the administrator would not be able to
6 depart from that specific procedure.

7 That probably could be refined some more to set forth
8 a basis of administrative review of state certification, but
9 in the absence of implementation plans, if the state does not
10 have an implementation plan, they will be no better prepared,
11 than is the administrator for determining what the effluent
12 should be.

13 Senator Muskie. I am trying to get the situation on
14 the present refuse act program, and the present law, that
15 is, of the states to be solicited for certification, are they
16 yet under the present permit program?

17 Mr. Billings. Yes.

18 Senator Muskie. Before the character of the discharge
19 has been established?

20 Mr. Billings. As a matter of fact, as I understand
21 it--

22 Senator Muskie. What are they doing about it?

23 Mr. Billings. The states were solicited in some
24 instances for certification before the nature of the
25 application was finally in.

12 1 Senator Muskie. The state of California has informed
2 the Administrator that they have limited resources, and one
3 of the last things they will do is certify Refuse Act
4 permits?

5 Mr. Jorling. They have considered the question
6 of making an affirmative denial for each one.

7 They agreed the law supported them on that, but they
8 decided the politics did not, so they decided to drag their
9 feet, and they did this by an affirmative resolution of
10 the Water Quality Board of the State.

11 Senator Muskie. So what is the situation then?

12 Mr. Jorling. The situation that adds only to the gen-
13 eral situation of chaos, that reins in this permit program.

14 Senator Muskie. What is the Federal Government's
15 intention, can they issue permits without that certifica-
16 tion?

17 Mr. Jorling. Not without it, but they will in effect
18 waive it earlier than the law required if they have not
19 received one.

20 Senator Muskie. What do you mean waive it?

21 Mr. Jorling. We have a provision in the law if the
22 State does not act to certify, or act to refuse certification,
23 then within a year the certification requirement can be
24 waived so what they are saying, we are going to presume they
25 will just sit on their hands after six months, and waive

13 1 certification, so they will in effect speed up the process
2 on the waiving, but the general--

3 Senator Muskie. How soon are the permits likely to
4 be ready for issuance?

5 Mr. Billings. Six months to three or four years
6 according to the testimony.

7 Mr. Jorling. January 1, 1972.

8 Senator Muskie. And they can wait until January,
9 1973, before they can issue certification without the
10 state?

11 Mr. Billings. One year, under the regulation,
12 reasonable time is considered six months, so if the appli-
13 cant files his application on July 1, and the state had failed
14 to act to deny certification by January 1, the Secretary of
15 the Army in this case could waive the requirement for state
16 certification.

17 Mr. Jorling. What they have done recently in the
18 first description of the Refuse Act permit, they were going
19 to take the results of these renounced twenty-two industry
20 studies, and attach to the permit that these studies reveal
21 what a secondary equivalent treatment for that particular
22 industry is.

23 The studies have been received, and they are completely
24 inadequate, and they have now determined that the matter will
25 not be handled at the national office, but rather the

1 regional director of each office of Environmental Protection
2 Agency, working with the states, shall agree on what is a
3 secondary treatment equivalent for that particular discharge
4 source in that region, so that this was just done two weeks
5 ago, and now that is going to affect the speed with which
6 permits shall be issued, which is still unknown, but they have
7 in effect recognized, as the states have told them, the
8 program is in chaos, and it needs some clarification.

9 The question that you raised is an extremely difficult
10 one to answer, if the Federal Government is under any circum-
11 stances to have a review authority over the quality of state
12 certification, with respect to the State certification ade-
13 quacy, and--

14 Senator Muskie. As I understand, what you have told
15 me, the Federal Government can waive the requirement for
16 state certification even before the State has any knowledge
17 of the character of the discharge that is being considered.

18 Mr. Jorling. Under the present program, that is
19 accurate.

20 Mr. Billings. Or the relationship of that effluent
21 of the time schedule and the state limitation--

22 Mr. Jorling. What we are trying to reach here is a
23 situation where the state certification will be the water
24 quality limitation on a particular discharger, unless the
25 administrator finds that those limitations are inconsistent

15 1 with the implementation plan of the state.

2 In other words--

3 Senator Muskie. But we are talking about a time
4 frame where there is not any implementation.

5 What Leon has told me, that as of January 1, 1972,
6 this requirement for state certification can be waived, and
7 that is before our Act takes effect, and that is before the
8 Federal Government has decided what discharges it will
9 permit, or what conditions we can impose.

10 This will be waived in advance of any action by
11 anybody.

12 Mr. Billings. For those applications which came in by
13 July 1, but that six months period slides on each applica-
14 tion--

15 Mr. Jorling. I can understand what I said is very con-
16 fusing.

17 The implementation plan I was referring to is the
18 approved implementation plan now for intrastate waters.

19 We do not have approved implementation plans, but all
20 of six states have implementation plans of the state, and
21 I think what we will have to assume is that the implementation
22 plan of the state is the same as implementation plan for
23 interstate waters, which there is evidence, --

24 Mr. Billings. To cover that, we have written here on
25 page, about the 6th page of this document, the 8th
page, it says the criteria against which the administrator

16 1 will make a judgment in the absence of implementation plans.

2 This will have to be conformed with that language,
3 but there is a criteria set that will enable the administra-
4 tor to make his judgment in the absence for a valid state
5 certification.

6 Senator Muskie. My question is the Administration has
7 no intention of making any sense out of all of this.

8 I do not see how you put the two together. It is
9 impossible.

10 Mr. Jorling. It may be impossible.

11 The only thing that I think may make it possible,
12 is if the permit procedure they initiated, and which we
13 had preserved here, is restricted to implementing
14 the state's water quality program, and for interstate waters,
15 that has been approved, although some of the states are
16 trying to slide their dates of implementation, and for intra-
17 state waters to accept the standards and plans as though
18 they were approved, but hold the discharge sources to a
19 requirement that is equal to a similar situation on interstate
20 water, to try to make intrastate distinction up to equivalent
21 by the time they are then required to come in with implementa-
22 tion plan, which will take them to the next achievement, which
23 is the national water quality standard, but between now and
24 1975, use the permit device to bring interstate, and intra-
25 state waters to the quality of water that is established

17 1 under the 65 Act, and then they would provide a common base on
2 which to base the next implementation plan and provide for
3 a period of achievement through 1980, for the national
4 water quality standard.

5 Beyond that, if they do the job by 1975, that is
6 required, 90 percent of the waters of the United States will
7 have met the national water quality standard.

8 Senator Muskie. Number one, what you are talking
9 about is a Corps of Engineers program.

10 The Corps of Engineers is undertaking to implement
11 a secondary treatment equivalent standard.

12 Now, that has got nothing to do with water quality
13 standards under the 65 Act, unless Section 21 has some
14 meaning, because the water quality standards input has to be
15 through Section 21, because there is no other in the Refuse
16 Act program as far as I know.

17 I mean, there is no input at the Federal level, unless
18 you fellows know something I do not know, and if in effect
19 the Corps of Engineers can waive the Section 21 certification,
20 even before anybody knows what secondary equivalent, secondary
21 treatment equivalent is, so that the state agencies can con-
22 form to the water quality standards, then there is no correla-
23 tion which will exist except by chance.

24 It is absolutely by chance.

25 Mr. Billings. Correlation will exist by chance.

18 1 You are completely correct, because the only coordina-
2 tion is the secondary treatment or its equivalent in the
3 states, and most of the states have been trying to establish
4 effluent limitation, which translates that into water
5 quality.

6 Senator Muskie. If you will wipe that out by
7 making this Section 21 certification meaningless, then there
8 is no control, there is no cross polination, or whatever it
9 is.

10 You havve just got them going down the road pell-mell
11 with the Corps of Engineers not knowing where they are going,
12 and then we are trying to set up a new water quality standard
13 here down the other road.

14 I just do not see any way of putting the two together.
15 I really do not.

16 Senator Cooper. Mr. Chairman, I have read hurriedly
17 the proposed amendment, dealing with the Refuse Act, and
18 I have gone through it quickly, are you directing your
19 question to this amendment?

20 Senator Muskie. Yes.

21 Senator Cooper. Would you mind now telling me what
22 your problem is?

23 Senator Muskie. All right. I have been thinking out
24 loud, Senator Cooper, and I may not have it straight, but I
25 think I can at least describe in pretty direct terms what my

19 1 present understanding is, and then the staff can correct
2 me.

3 First of all, we have, let's take the current state of
4 the law, the current state, we have the water quality
5 standards program that has been developed under the 65
6 Act, under the present state of the law permits which are
7 issued either by the state or by the Federal Government are
8 subject to certification by the states, in accordance with
9 their water quality standards.

10 Now, when we wrote that certification procedure into
11 the law, there was no Federal permit program relating to dis-
12 charge of pollutants, so the certification procedure--

13 Senator Cooper. The Refuse Act was not then exer-
14 cised?

15 Senator Muskie. So the certification procedure
16 related to other kinds of permits, dredging, for example, and
17 so on, that might be issued by Federal agencies, and those had
18 to be certified by state agencies, and there was a fairly
19 straight line kind of certification, because the proposed
20 discharger in his application for a permit would describe the
21 character of the discharge, and the Federal agency and state
22 agency was then in a pretty good position to evaluate at
23 that time that simple discharge, and if they certified it
24 was not consistent with water quality standards in denying
25 the certification, that if it was consistent, then they

20 1 issued such certification, so there was a pretty straight line
2 proposition, and it was all tied to water quality standards,
3 and the purpose was to gradually upgrade water quality
4 standards over time, a process that was not moving rapidly
5 enough.

6 Well, now, the Federal Government has discovered
7 the Refuse Act program, and under the Corps of Engineers, it
8 is undertaking to control all discharge, in the navigable
9 waters, so that includes presumably interstate, and some
10 intrastate.

11 Mr. Billings. Most intrastate, and it is proposed to
12 control all discharges into navigable waters setting a
13 secondary treatment equivalent standard for discharges.

14 Nobody really knows what secondary equivalent is for
15 all industrial discharges, but presumably the Corps of
16 Engineers will develop some standards eventually, or EPA
17 will for secondary treatment equivalent.

18 Now, under the certification procedure that I have
19 just finished describing, that kind of permit is subject to,
20 technically subject to state certification, but as I under-
21 stand what has happened here, for all practical purposes, it
22 is meaningless now, because the application, the applicant
23 for a permit does not really know when he applies, what the
24 permissible discharge will be.

25 It is his responsibility to go to the state agency

21 1 for certification, and the state is required to act before
2 it knows what the ultimate permissible discharge will be, and
3 if it does not act on the basis of that initial permit, then
4 under the certification requirements of the law, the Federal
5 agency can waive state certification even before the Federal
6 Government has decided the nature of the discharge that will
7 ultimately be permitted, and we have no clarification from
8 the Federal agencies at this point, as to whether that is
9 in fact what will happen, so that for all practical purposes
10 then, unless a rationalization of the two programs is somehow
11 developed, either by the Federal agencies, or by us in this
12 law, the state certification is meaningless.

13 That means that there will be no tie in between the
14 water quality standards as now provided under the law, and
15 the Refuse Permit Program, which is now being developed,
16 and it is going to take from six months to three to four years
17 before all of the polluters, all of the discharges will know
18 what kind of discharge they will be permitted under the
19 Refuse Act, so that is one road we are going down, without
20 any clear understanding at this point of the secondary treat-
21 ment equivalent of industrial discharges, so we do not know
22 what quality of water that will produce.

23 Now, in the meantime we are trying to develop this
24 other program, and it is going to take, according to deadlines
25 of the timetables that are now in the bill, and the staff

22
1 has put this together for us.

2 Senator Cooper. Under first impression, do you think
3 this is a means, a mode to reach the problem?

4 Senator Muskie. Not unless we get a clarification,
5 a rationalization of the relationship between the two,
6 so that what troubles me is this, you know, all of this time-
7 table here, which presses pretty hard on reality, as I look
8 at it, is going to require until July 1, 1974, before we
9 finally have the promulgated state plans, for implementing
10 the new water quality standards we are talking about.

11 Now, that is three years into the future, and it
12 takes a lot of lead time, and at that point, when we will
13 have spelled out presumably with the states, we would have
14 spelled out discharge requirements, geared to a quality of
15 water, which would permit a balance of ecology, fish, wildlife,
16 recreation, in and out of water, and that is the standard
17 we are talking about, and with three years of concentrated
18 effort, which would press hard on reality, we will reach
19 that point, and when we reach that point, under my present
20 understanding of the Refuse Permit Program, that may be 180
21 degrees away.

22 There is no way of being sure that we will end up at
23 the same point.

24 Mr. Billings. I might point out, on this timetable,
25 the timetable here was developed without reference to the

23 1 Refuse Act program, or to ongoing present programs of water
2 quality standards, so if we would start new, with a clean
3 slate for all waters, this would be the timetable that
4 would be imposed.

5 If you consider the fact some states already have
6 plans for implementation, and already have compliance
7 schedules and effluent limitations, so there is a phasing
8 problem too, so this is really developed that there is a
9 new law with a new goal.

10 Senator Muskie. I understand, so my statement is
11 accurate.

12 Even pressing hard, this takes three years to get
13 moving, and we have not got three years to waste, and if
14 we consume that three years, and get down there three years
15 down the line, and find that the Federal Government is taking
16 or talking out of two sides of its mouth on what it expects
17 of industry, of the states, of communities, we will just
18 have a mess.

19 Senator Cooper. May I ask this question?

20 In consideration of this problem, which is clear
21 enough, has the staff considered any kinds of measures
22 that could be pursued under the Refuse Act which would at
23 least reduce pollution to some degree, but which would not
24 compromise the purpose which we intend to do under our bill,
25 which has been passed, and which we proposed on this bill,
is there anything?

24 1 Mr. Billings. That is basically what this program
2 outlines, where the interim program is to implement existing
3 standards, making sure that in all cases public health is
4 protected, by a date certain of 1975, which would be a
5 little faster than some states expect to move.

6 For example, Maine is October 1, 1976, and it would
7 not slow down any states, because we would grant a grand-
8 father clause in the existing deadlines of the time schedules
9 to the extent they are faster, and then this new program
10 would be in the process of development, while we are complet-
11 ing the ongoing activities with the new program of implementation
12 to begin on the date, that is the old program, existing pro-
13 gram expires.

14 In other words, whatever date, 1975, the existing
15 program is completed, and all states would begin to shoot
16 for the national water quality standard for which they would
17 have an approved plan of effluent limitations, and so on.

18 Senator Cooper. From reading this, it would seem
19 to me you were dealing with methods, procedures, that are
20 being characterized, being carried under the Refuse Act, to
21 some degree, is that correct?

22 Mr. Billings. That is the only way we can see to pull
23 them together, without completely wasting the state's time
24 of coming in with new implementation plans for all of the
25 streams, for which they presently have the limitation plans.

25 1 Senator Muskie. I think that is an accurate description,
2 and I have not seen this language before this morning either,
3 and I think that is an accurate description of what the
4 staff tried to do, but I think the difficulty which they have
5 not resolved, I do not think they could resolve is the
6 question of how you conform, as this plan unfolds, and this
7 involves states, industries, and so on, how you perform the
8 developing requirements under the two programs, so that when
9 you end out, industries, you know, are moving in one direction,
10 it knows what is required of it, and what it must do, and what
11 the timetables are and so on.

12 If you gear up, you know, I assume that all polluting
13 industries will have to make this process changes, will have
14 to do something about either closed cycling their effluent
15 or treating it in a way that would meet the standards, but
16 in any case, they are going to have to invest time and
17 money in plans, and hardware, and plant design, and all of
18 that.

19 Mr. Billing. We have another problem, that is
20 equally significant, and that is if you impose a deadline on
21 industry, that is out of phase with the municipal construction
22 program, then the value of integrating this and the industrial
23 waste will be lost, because communities will be coming along,
24 completing their first round, at a date potentially later than
25 the date in which you are going to impose control on industry,

25 1 which is the effect of the existing Refuse Act permit program,
2 and I am not talking about economic feasibility.

3 I am just talking about the cost effectiveness of
4 the investment of making industries going ahead, slightly
5 ahead, six months and a year ahead of the municipal con-
6 struction program.

7 Senator Muskie. It may be that I am seeing a bogeyman
8 that does not exist, but nobody has been able to persuade
9 me of that, and I just do not understand why these
10 obstacles are not apparent to the agencies, and why there
11 is some reluctance.

12 We have asked them formally to come up with proposals
13 to put the two programs together.

14 Mr. Jorling. What they have done, Senator, they
15 have said that the language that the staff has recommended
16 here, which was not the same here, is satisfactory to
17 them, as far as reconciliation, and that was done through
18 the Council on Environmental Quality, which is still wherever
19 the views are asked on this particular aspect of the legis-
20 lation, responds rather than EPA.

21 EPA did win a victory within the Administration on
22 that, to get them to go at least as far as accepting what
23 the recommended language was here, which was basically a
24 Federal administration of the program, until the state had
25 shown to the administrator it was capable of administering

the program, and then it was delegated to the state.

On the staff language here, if we interpret it this way, if we interpret the language, the certification that comes with the application as the application itself, in other words, the present situation is now with the Corps of Engineers, has a very detailed application grant, which it receives direct from the polluter, or the discharge source, and it has a requirement of information in it, which may or may not be at all conforming with the kind of information the state of that source has, so that if we said that the Federal Government shall promulgate regulations, which will specify what the content of the certification is, in other words, the effluent limitation to be imposed by the state, the monitoring to be imposed by the state, I think it would have to be broadened to say include, if any, or applicable present treatment or toxic standards promulgated by the Federal Government, and also some kind of statement to accommodate the problem that Leon just suggested, that is, if their plan of implementation calls for an industry to connect to a municipal treatment facility, as soon as that treatment facility is ready, which may be three years from time present, then rather than having that treatment, that discharge source comply with a secondary treatment facility, which would require the industry to do it itself, and then ultimately refuse to go into the municipal system, but rather to state

28 1 in its certification that this industry source will connect
2 up with this municipal system in two years, three years, and
3 the requirement we are imposing on that industry in lieu of
4 that interim, in the interim is toxic pre-treatment, not
5 secondary treatment.

6 You give some, but ultimately you gain.

7 You give a couple of years performance, to get
8 that industry to get an adequate system, which you then
9 control.

10 Senator Muskie. You are including control of toxic
11 substances, as though this were going to be implemented
12 by the Refuse Act permit program.

13 What is there that says that that will be the fact?

14 There is no connection between the two. The Corps
15 of Engineers is not the administrative agency on toxic substanc-
16 es.

17 What cranks the two in?

18 Mr. Billings. Under the revision of the permit program
19 that the staff language sets forth, A, the Corps of Engineers
20 would--

21 Senator Muskie. I am not talking about that. I am
22 talking about now.

23 I want to know what they have got in mind. When I try
24 to fool around with a blueprint that is built upon, built
25 upon an unknown intention with respect to the permit program,

29 1 I am lost. I want to know what makes you think that if we
2 pass this law, without any revision of the permit program of
3 the Section 21, which is our responsibility, what cranks in
4 the toxic substances controls into the permit program?

5 Mr. Billings. Nothing unless we do it.

6 Senator Muskie. We have no recommendations to crank
7 it in.

8 Mr. Jorling. We had in the administrative bill that
9 the administrator have authority which could include a
10 prohibition for toxic substances.

11 What they have done under the existing executive
12 order, the President assigned the permit responsibility to
13 the Corps of Engineers, and assigned the water quality
14 responsibility to the Environmental Protection Agency.

15 The Environmental Protection Agency then is
16 establishing limits on toxic substances based upon the
17 authority that I described before, that if you can
18 prohibit it, you can selectively permit it, and they are
19 defining their own standards, and there is no statutory
20 reference, but on their own assessment of what is toxic,
21 and what is not toxic, and what quantities are toxic, and
22 what quantities are not toxic, effluent limitations, and
23 they are doing it on a not priority basis, which they are
24 saying, mercury henceforth shall be limited to this extent,
25 and they are doing it as a function of each permit applica-
tion.

30 1 They review it, the effluent data they have received,
2 pursuant to the application grant, and they make a judgment
3 of how much toxic should be removed, as a part of this permit
4 program, and that is the way they are doing it.

5 I will not say it is working now because it is not
6 working, but that is the description, and they review it, each
7 set of effluent data, and make a study of the data.

8 Senator Muskie. Let me ask you a second question.

9 If we should proceed with the development of this
10 national water wquality standard, you know, by 1974,
11 conceivably, it would be subsequent to the issuance of per-
12 mits under the Refuse Act, the effluent controls under that
13 permit system, in many, many cases, will not achieve a
14 quality of water that satisfies this new legislation.

15 Now, what provision is there in the permit program
16 then to change the permits, are they revocable, who is going
17 to decide whether or not they must be changed, and recalled,
18 and modified to conform to this program?

19 Mr. Jorling. Under this very elaborate regulation,
20 first of all, in the recommendation itself, there is a
21 clause that says permits issued are revocable at will.

22 It says these permits are issued subject to withdrawal
23 at anytime, and the anytime referenced to the need to upgrade
24 the water quality as is necessary by water quality standard,
25 and future legislation.

31 1 Now, what the procedure is, is a little bit less
2 certain than that.

3 It does not say that if a state recommends to the
4 administrator that a permit be withdrawn, and a more
5 stringent one imposed, whether that will in fact be honored.

6 This is one of the things the good states are upset
7 about, because they are not sure that that is the case, and
8 then there is no clear requirement that the Corps will
9 withdraw permit on request of EPA, although they acknowledge
10 that it would.

11 There is nothing in writing that says that, but the
12 people that are administering the program, that anytime an
13 administrator determines the permit should be revoked, and the
14 effluent upgraded, that the Corps would follow suit, and
15 administer the necessary withdrawal and reissuance of the
16 permit.

17 Senator Muskie. What does the polluter do?

18 If on July 1, 1974, he has a permit from the Corps
19 of Engineers, which says what you are doing is fine, and he
20 has a notice from the state water quality standard, what you
21 are doing is not fine, both of them backed up by the authority
22 of the Federal Government, what does he do in that instance?

23 Mr. Jorling. Under existing law, assuming they do not
24 address that in this statute, there would be an uncertainty
25 that some people would say the direct Federal permit, the

32 1 one the applicant receives directly from the Federal Govern-
2 ment would override by some theory of Federal pre-emption, the
3 State approved requirement.

4 Senator Muskie. So if the state approved requirement
5 met a higher quality of water, then the Federal Government
6 would be in effect in a position of endorsing dirty water
7 concept?

8 Mr. Jorling. That could be one of the contingencies.
9 When confronted with these kinds of hypothetical considera-
10 tions, they would say we would not let a Federal permit
11 occur in that situation.

12 Mr. Meyer. They will be esstopped by the language
13 of the permit itself.

14 Senator Muskie. This could happen in thousands of
15 cases.

16 You are not just talking about one which would be fairly
17 easy to avoid such a conflict, but if you had thousands of
18 them, how do you say on top of them, how do you process
19 them.

20 Mr. Billings. And if you were just talking about
21 a big steel plant on Lake Michigan and a big refinery on
22 San Francisco Bay, it would be one thing, but you are talking
23 about an awful lot, going back to the example of the 700 cow
24 feedlot, or a thousand cow dairy, whatever it is, you are
25 placing it an almost impossible burden on the individual

33 1 farmer, and it is tough to get into a kind of conflict with
2 an administrative bureaucracy, both the state and the
3 Federal Government.

4 Mr. Meyer. There is also another almost unresolved
5 problem, that is the question of the industrial plant that dis-
6 charges into a municipal waste treatment plant, and in this
7 case the plant itself is not covered, but there is nothing
8 under the present set-up that prevents the Corps from saying,
9 you need a permit too, to the industrial plant, because you
10 can follow the discharge back to the source.

11 Mr. Billings. They are interpreting it as long as
12 it is going into a treatment plant---

13 Senator Muskie. There is nothing in the law that
14 prohibits the other interpretation if they want to change
15 it.

16 Mr. Jordan. Just speaking speculatively, without
17 having talked to anybody, I want to make a recommendation.

18 The Administration with all of the best intentions
19 in the world have committed themselves to a program that
20 they have come to learn will not work, and with a great deal
21 of fanfare, they have employed this program, and it is
22 difficult to back off of it, but I think in truth, what they
23 have learned is that the National Permit Program may be of
24 value in developing an inventory of what the point sources are,
25 but because of the evolution of the various state programs,

34 1 to try to use the permit program at this point in time, as an
2 enforcement device, which they were encouraged to do, by
3 Congress and others, because it encumbers Federal enforcement
4 processes that we have in existing law, they have come to find
5 it is absolutely unworkable, and they have thrown up their
6 hands and told their regional administrators to do the best
7 they can out of a sorry situation.

8 What I think we should try to set up is a process for
9 use of the state permit programs, where they are useful in
10 the inventorying, and in the enforcing, and from a Republican
11 point of view, try to help the Administration to get off the
12 hook.

13 Senator Muskie. I am trying desperately to do that.
14 If you give us a little help, we might be able to get them
15 off the hook.

16 Mr. Jordan. I think maybe this whole effort to try
17 to work what they have done into our Act may be futile.

18 I think it is really inconsistent with the rationale
19 process we are trying to develop.

20 Senator Muskie. On the other hand, if we do not change
21 21(b), and by our default, there is not anything, either by
22 changing it, or by defaulting on the changing of it, we
23 cannot avoid getting entangled with it.

24 If I could see a way of walking around that, I might
25 be tempted to take it, but I just do not know how you keep

1 your hands out of it.

2 Mr. Jordan. What about just repealing the Refuse
3 Act and building our own permit program?

4 Senator Muskie. Then that makes us the scapegoat.

5 Mr. Billings. The effect of the staff draft is to
6 repeal the Refuse Act, and to set up a permit program.

7 Senator Muskie. How about simply providing that
8 any--

9 What effect would this have, if we simply changed
10 this 21(b), to make it clear that state certification of
11 water quality standards must be obtained, when the character
12 of the discharge was finally defined, by the applicant, to
13 the permit, or by the appropriate Federal agencies?

14 In other words, if you make it clear that--

15 Mr. Meyer. That is easily enough done. We change
16 it from the applicant getting the state certification to
17 require the Federal agency to get the certification after
18 it is ready to issue permit.

19 Senator Muskie. That would be a simple straight
20 line way of doing it, and it would force them to crank into
21 the water quality standards, whatever they are.

22 Mr. Meyer. The problem is you have required a redundant
23 operation, number one, the Federal Government is required to
24 make, what is to meet the state water quality standard, and
25 the concept that we have tried to do is that the states know

36 1 best, what their discharges are, and what requirements are
2 based on them to bring them into conformance with the water
3 quality standard.

4 There you have the ones that should be under the
5 State-Federal relationship we have worked with, that have
6 that responsibility, and have not only the responsibility, but
7 the best position to do it.

8 But, really, all you want the Federal Government
9 Program to do is to make sure that is done.

10 Senator Muskie. That is what we are proposing.

11 Mr. Jorling. You would require the applicant to come
12 to the Federal Government, the Federal Government to set an
13 effluent limitation, and then propose that effluent limita-
14 tion to the state.

15 Senator Muskie. How does that upset the State's
16 authority?

17 Mr. Jorling. We are finding the Federal Government
18 is incapable of setting those effluent limitations.

19 Senator Muskie. All we are saying is those effluent
20 limitations have to conform to water quality standards, which
21 Federal law has produced.

22 All we are asking is that the Federal Government make
23 sure its right hand knows what its left hand is doing.

24 Mr. Billings. That implies the capability of the
25 Federal Government to set effluent limitations on a source

37 1 by source basis, and I would argue that the Federal Government
2 does not have that capability.

3 Mr. Meyer. That is what it is doing.

4 Senator Muskie. At least it is a straighter line
5 connection than you have built into this.

6 Mr. Meyer. Unless the state has established a
7 procedure for this, and the administrator has approved their
8 procedure, in this case, the state's certificate shall be
9 it.

10 Mr. Jorling. That is what we are trying to do here.

11 Mr. Meyer. I think you have to go to the other step
12 first, until you clear the deck on who has the final say,
13 in those cases, where the state does not have the capability
14 now, this is the problem area.

15 If all states had implementation plans, then there
16 would not be any problem going this route, but all states
17 do not have implementation plans, even those that have may
18 not have adequate implementation plans, and the point is
19 the Federal Government has shown it is not capable of carrying
20 this role.

21 I think we have three days of executive session of
22 examination with the Administration, and with the people
23 operating the program, and that clearly points out they do
24 not know where they are going, but the thing is you have got
25 to set up, where they have got to say, we will let the states

38 1 do it, because we will approve what the states are going to
2 do, and then you can key in the rest of the program.

3 Senator Muskie. Is it not clear we have these
4 options, one, you can try to keep both programs going,
5 or we can eliminate one, and off with the other.

6 I am not about to eliminate the water quality standards
7 approach.

8 I think to do so now, we have to back up eight months,
9 and start all over again, and on the question of eliminating
10 the Refuse Act Program, I do not see any real reason why we
11 should pull that chestnut out of the fire, so if you are going
12 to try to put the two together, and if water quality standards
13 mean anything, does not the Refuse Act Program have to be
14 made subject to the water quality standards approach?

15 There are only two points of entry. There is the
16 Federal level and there is the state level.

17 You send them to EPA and require them to clear
18 it with EPA or send them to the state, which is subject to
19 EPA, of course, and clear it there.

20 This is the easy option. You can duck it all you
21 want to, but you are open to those options.

22 The only other way is to leave them growing separately,
23 and I hope that somehow, it will all come out in the wash.

24 Senator Cooper. I agree with that, that the water
25 quality controls, you have this interim period, and that

39 1 cannot be implemented fully.

2 What I asked a while ago, are there some functions
3 that can be continued under the Refuse Act, which could be
4 useful, but which would not come, as I understand your
5 Section G and H, are they directed toward the Refuse Act in
6 this draft?

7 Mr. Jorling. Yes, the sections--

8 Senator Cooper. Provided some exceptions, if a permit
9 has been issued, there is a waiver for time.

10 Mr. Jorling. Those two subsections are carried over
11 without change from the existing law, that provides Sub-
12 section G, provides that if a discharge activity, or if an
13 activity that requires a Federal permit is required to receive
14 multiple Federal permits, and it receives certification for
15 one, then the certification shall be good for the other, or
16 for all others.

17 Mr. Billings. Subsection G would have to come out.
18 That would mean you would have no Federal permit program
19 under this proposal.

20 Mr. Jorling. Yes, that would have to come out. We
21 would have to reconcile that.

22 Senator Eagleton. What is the status of the Federal
23 permit program under the Refuse Act, what are they doing
24 with it now?

25 Mr. Billings. The permit applications, as I understand

40 1 it, are being referred to the regional offices of EPA, and
2 the district engineers of the Corps, for the establishment of
3 effluent limitation of the sources related.

4 Senator Eagleton. What standard is being used as
5 a rule of thumb, is there an overall rule of thumb?

6 Mr. Billings. So far as we know, the attempt to
7 develop an overall rule of thumb has been abandoned, and
8 that the regional offices, in fact, there is a letter some-
9 where, the regional offices of EPA have been directed to
10 develop source related effluent limitations, which relate
11 to water quality standards, but no further instructions at
12 this point.

13 Mr. Jorling. Not even on toxics at this point.

14 Senator Eagleton. Thus no permits have been
15 issued?

16 Mr. Jorling. None have yet been issued, and they
17 expect the first ones to be issued sometime after January
18 1.

19 Mr. Meyer. But they will not have any prosecutions to
20 anybody that has filed these papers, that stays the prose-
21 cution.

22 Mr. Jorling. It is 180 degrees the other way, it says
23 filing an application does not give you immunity to suit for
24 damages of the Refuse Act.

25 The Attorney General has given that choice.

41 1 Mr. Billings. As the Committee was informed, they did
2 not intend to take enforcement actions.

3 Senator Muskie. Suppose we had that straight line
4 relationship, in other words, make sure the discharge
5 finally, the final character of the discharge is subject
6 of state review in certification, if in addition this is
7 an attempt to do what Senator Cooper is talking about,
8 but in addition, the imposed requirement that the quality
9 of the discharge should be at the highest level of the three
10 standards, one, the standards permitted under the water
11 quality act of 1965, or, two, the secondary treatment
12 equivalent of the permit program, or, three, the requirements
13 developed under this Act for toxic substances, present
14 treatment, and finally the implementation itself.

15 In other words, if you took whatever advantage, the
16 form of program presented in the terms of water quality,
17 or quality of discharge, as the floor, the floor is the
18 highest of the three.

19 Mr. Billings. In other words, Mr. Chairman, if the
20 Environmental Protection Agency were to indicate to the
21 states that they intended to issue a permit, where they were
22 considering issuing a permit for an industrial source, which
23 met what EPA thought was the equivalent of secondary treat-
24 ment, and that number, whatever it may be, or that series
25 of numbers, is higher than the series of numbers that the

42 1 state had imposed on that industrial source, as a result of
2 the plan for implementation of the water quality act, then
3 EPA's new effluent limitations will apply.

4 Senator Muskie. That is right, but if the effluent
5 limitations were below, then either the state standards, the
6 state requirements would hold.

7 What you would be doing is using a permit program
8 to crank it up, but you would not allow it to create incon-
9 sistencies, or to reduce water quality.

10 Mr. Jorling. The only question I have is whether
11 or not the experience under the Refuse Act to date would
12 indicate that the Federal Government receiving these applica-
13 tions from the fifty states could impose at the outset a
14 secondary equivalent for that discharge source.

15 Senator Muskie. That is what they are undertaking
16 to do, is it not?

17 Mr. Billings. I think that is the question.

18 Senator Muskie. What can we do to prevent them?

19 Mr. Billings. Under the Water Quality Act of 1965,
20 some implementation plans are specific as to source, and in
21 those instances EPA has the capability of determining a set
22 of effluent limitations for those sources.

23 Under this Act, EPA will be required to establish
24 certain effluent standards under Section 307.

25 Again, EPA will have the capability to determine as to

43 1 source what the effluent limitations should be for the
2 specific plants in question, but to impose on EPA a require-
3 ment that they also determine what secondary treatment
4 means, one may be impractical, and, two, may viciate the
5 validity of keeping the states in the program, and it
6 creates some real mental blocks.

7 If anybody knew what secondary treatment was, then it
8 would be an easy thing to impose, but nobody knows what it is.

9 Senator Muskie. That is the problem created by the
10 permit program.

11 Mr. Billings. I understand that.

12 Mr. Jordan. Mr. Chairman, just trying to reiterate
13 a slightly different way, as I said earlier, I understand we
14 do have a chestnut problem, but it seems to me contrary to the
15 processes of committing ourselves to take at a starting point,
16 an existing program, that simply is not working, that is the
17 previous act program, it was well intended, I think it had
18 two components.

19 One was the inventory component, and the other
20 was enforcement, and the Administration felt under pressure
21 from environmental groups to develop more speedy access to
22 large and visible industrial polluters, and they found that
23 in a law that was not designed, and it has not worked, and I
24 think normally in the subcommittee, what we try to do is to
25 design a program that will accomplish what we want to do, and

44 1 I think in a way we can divert from that general constructive
2 process by trying to frame a program around an existing
3 program with very questionable value.

4 Senator Muskie. Why don't we consider this course of
5 action, why don't we say, since the permit program has just
6 begun, and nobody really knows what its full implications are,
7 that it is in the process of evolution, for a year, and we
8 will let them develop that program, and see where it is going
9 to, and then a year from now, we will build on the foundation
10 that they are constructing, a new program, continuing in
11 the meantime, you know, the waste treatment facilities
12 program at the new levels of funding that we see necessary,
13 and then we will see where we come.

14 Mr. Billings. This is not entirely consistent with
15 the recommendation of the environmental quality, which asks
16 to continue the program in the Corps of Engineers, and it asks
17 specifically not to repeal the Refuse Act of 1899, but con-
18 sider going ahead to develop another program, so they can
19 have both programs and make the decisions themselves when
20 they transfer, so what the Chairman is proposing is consis-
21 tent with the recommendation.

22 Mr. Jorling. Let me look at Rue Goldberg here just
23 for a second.

24 Senator Muskie. The more I think of that last course,
25 the more attractive it is.

45 1 Mr. Jorling. If you turn to page 97 and to page
2 106, what the effort is here is to upgrade what a certifica-
3 tion is, what a certification includes in that certifica-
4 tion.

5 The effluent limitation in the schedule of compliance,
6 and what have you, and then back on page 106, we provide the
7 Administrator shall issue a permit, subject to condition of
8 any section issued under 401, and so on.

9 In other words, what we are trying to do here is to
10 say that the certification is the effluent control vehicle,
11 that will attach to any Federal permit issued under this
12 authority, unless the Administrator determines that the
13 state has not complied with the requirements, which is
14 necessary to get at the states that do not have the capability
15 of, or the will, because it is more a question of the latter,
16 that they have not imposed effluent limits on their discharge
17 sources, they have not imposed the time factor of compliance,
18 and this would enable the Administrator, such as in the
19 State of California, certification will provide for com-
20 pliance with its water quality standards, and on the other
21 hand, it would provide for un-named state action, that sent
22 in a certification that did not include an effluent certifi-
23 cation, or a timetable, for the Administrator, for the
24 Administrator to substitute a set of conditions, which would
25 in his judgment bring the discharge source into compliance,

46 1 into the 1965 Act requirements, and that preserves all of the
2 features of 21(b) that I think we want to preserve with respect
3 to other Federal applications, and at the same time I think
4 that is not done here that I think has to be done, and it is
5 that the certification shall also provide for an incorpora-
6 tion of any of the Federal treatment, present treatment and
7 toxic substance standards that are promulgated, so that the
8 applicant in effect knows at the time he is at the state
9 certification level, all of the control requirements he will
10 be placed under, and that can be done in effect by trans-
11 ferring out the authority that is presently held in Sub-
12 section B(1) of the Administrator to determine whether or
13 not the discharge is in compliance with the toxic, or
14 present treatment standards under 307, if applicable.

15 I think that requirements should be placed in
16 certification, and then the Administrator simply reviewing whe-
17 ther or not the state certification did in fact impose the
18 requirement that the discharger comply with the Federal law.

19 Senator Muskie. Everytime you take me through this,
20 you get me lost along the way.

21 Mr. Jorling. Do you want me to repeat it slower, or
22 not at all?

23 Senator Muskie. I am attracted by the suggestion
24 by me. We act as though the permit program does not exist,
25 because the Administration has thrown up its hands on it. If

47
1 that is the case, and on proper assurances, I am willing to
2 assume it is, why not just make the straight line connection
3 that I suggested earlier.

4 In other words, you know what we want to do, it is to
5 make sure that there is a connection between the two, to justi-
6 fy, to just give the state certifying agency a crack at the
7 final discharge, final character of the discharge, or
8 whatever formula, and then if the permit program is dropped
9 or not pursued, you have not lost anything.

10 The water quality standards program would proceed and
11 develop on its own, and the other one, if by any chance does
12 persist, then there is a cross connection which would insure
13 that there be an opportunity at least to conform the two.

14 If the permit program does not persist, and it just
15 lapses into an inventory of point sources, you have not lost
16 anything either, so all you need is a simplest kind of
17 connection between the two, rather than a complicated one.

18 Senator Boggs. I think you are right.

19 Mr. Billings. Making a very simple change of 21(b),
20 which goes to prior issuance of the permit, rather than
21 have the applicant come to the state, he comes to the Federal
22 Government, and the permit is sent out to the state, and the
23 state says yes or no.

24 Mr. Meyer. That will leave the Corps with respect to
25 navigation, AEC with respect to its own, and the Federal
Power Commission with respect to its situation, making final

48 1 determination as to the substance of its permit, which will
2 not harm navigation.

3 The final say on water quality will belong to the
4 state.

5 Senator Muskie. Subject to all of the Federal authority
6 and back up we are writing into this law with respect to
7 water quality standards.

8 Mr. Meyer. They will be the final determinant on that
9 one issue.

10 Senator Muskie. Not final. Any state decision on
11 water quality I take it is subject to Federal review
12 authority.

13 Mr. Billings. In terms of implementation, but if
14 the state says no, would you make that subject to review?

15 Under the existing law, if the state says no, that
16 is it.

17 If the state acts to deny certification to a
18 permit to build a High Mountain Sheep dam on the Columbia
19 River--

20 Senator Muskie. The state authority is whatever it
21 would be in the absence of the program on discharges.

22 You are not changing it. What I am suggestion does
23 not change it.

24 It is whatever it is, if there were no permit
25 program, whatever we make it, independent of any permit

49 1 program.

2 All I am saying is that it shall be subject to
3 the state's water quality standards, which are established
4 under this legislation, which has a Federal input, Federal
5 back up, and all of the rest of it, together with Federal
6 endorsement.

7 Mr. Meyer. It leaves one issue, and then there is
8 another issue, the issue is do you want to transfer the
9 authority for the permit program from the Corps of Engineers
10 to EPA, which that does not address, because the Corps would
11 be the agency under Section 13 of the 1899 statute.

12 Mr. Billings. The thing is that the Administrator
13 would have the authority to transfer it.

14 Mr. Mayer. As long as that is done with--

15 Mr. Jorling. A couple of things that would require,
16 and assuming you would support writing the new ocean dumping
17 provision, because we have got now the ocean dumping section
18 woven into this, and if you do not transfer that authority
19 from the Corps, well, my first reaction is that we will have
20 all kinds of chaos, because we have now the possibility of an
21 ocean dumping bill that would create authority to dump materials
22 up to Great Falls, with tide ebbs and flows.

23 The Administration ocean dumping bill, we do not
24 address that in here.

25 That is the kind of legislation I think we can look

50 1 for.

2 You have to weave that in.

3 Mr. Meyer. This is another issue prior to that one.
4 Once you make the decision to leave to the Administration the
5 decision whether to transfer the permit program from the
6 Corps to the EPA, you also want to ignore the issue of
7 delegation of permit authority, the permit authority itself
8 to the states, where the states show they can handle it.

9 Mr. Billings. It is not that --

10 Well, isn't it largely irrelevant if the states have
11 the due process?

12 Mr. Meyer. Except for the applicants themselves, in
13 the State of California, it would make it a lot easier if
14 they could at sometime get a hold of the whole program with-
15 out having to have the Federal Government involved, as to
16 whether or not as an auditor of whether their program is
17 ready to answer it.

18 Mr. Billings. Would it not be better for the Committee
19 to get a recommendation on that after they have had
20 experience?

21 Senator Muskie. I think this approach embodied in
22 the bill, which this Subcommittee reports to the full
23 Committee, ought to be presented in a murky world, you ought
24 to have one clear strong beam of light, just this presented
25 to the full Committee, in its clearest and most pristine form,

51 1 that might be the best way, to finally get some constructive
2 thought focused on the problem.

3 Senator Boggs. It simplifies it.

4 Senator Muskie. What we are talking about is assum-
5 ing you are right, and that the permit program is in effect
6 dead, so why not treat it that way, by making a straight
7 line connection, as I suggested earlier.

8 Senator Eagleton. Under your straight line, what
9 standard would the EPA issue in order to decide to issue
10 a permit in 74?

11 Senator Muskie. They still have the authority there
12 now to assert. We are not going to change it. We are just
13 saying at such point, as that permanent process identifies
14 the quality and character of the discharge, that it is then
15 subject to certification by the state agency, as to its
16 conformance with state water quality standards, whatever
17 state they are then in.

18 Mr. Billings. I think Senator Eagleton raises
19 a very interesting question, if the Committee follows that
20 approach, then would this be the procedure that would be
21 followed as to intrastate, and would--

22 Senator Muskie. You are acting as though the permit
23 program is going to be alive. I am assuming it is going
24 to be dead.

25 Mr. Billings. Assuming it is dead or alive, forgetting

52 1 it is dead or alive, the staff would need instructions as
2 to how to deal with the extension of Federal control over
3 intrastate waters as to right now, and also or in relation
4 to that, how to deal with the question of implementation of
5 a national water quality standards for both intrastate waters
6 and interstate waters.

7 Senator Muskie. I am not bothered by it, not today
8 at least.

9 Senator Eagleton. Why do we have to assume the
10 permit program is dead?

11 Could you clarify that for me?

12 I do not see the ray of light yet. It is still a
13 little murky.

14 Senator Muskie. Would you like to make the case
15 again?

16 Mr. Jorling. The Administration's program is in a
17 state of chaos.

18 In this fiscal year, they will receive 600 additional
19 positions from the Bureau of the Budget to try to bring order
20 out of that chaos, and my own feeling is that it will not
21 die, that there is just no way that this program, which has
22 been embarked upon, will die.

23 It could create chaos, as it has, and I think this
24 creates a tremendous burden on industries trying to comply
25 with something, and on states trying to build their own

1 programs.

2 I think the case can be made that it should die,
3 but I do not see that it will.

4 Mr. Jordan. Are there not reasons for it not dying
5 politically rather than problematically?

6 Mr. Jorling. I am sure they are in part political,
7 but I would think that there are many people, and I think
8 I would number myself among them, that feel there are many
9 state programs that are completely inadequate, and that some
10 Federal presence is necessary to get a handle on discharges
11 going into the waters.

12 Mr. Jordan. But we have always given the states
13 the opportunity to act first, and where they do not act,
14 we presume we would follow on our usual procedure of the
15 Federal Government assuming the authority, but to have
16 a Federal permit program, despite whatever Federal programs
17 you make, to join it, and there was an effort, however bad,
18 to do that in the regulations, but what we really have I
19 think in response to political pressures, say from public
20 interest groups, that saw huge polluters that were not being
21 prosecuted, because all of this enforcement processes, they
22 felt that there must be a conceivable way to get in and
23 prosecute, and I think we find we have hundreds of thousands
24 of applications, with varying standards in various states for
25 the permits to be measured against, and that letter to the

54 1 regional administrators indicates the people of Washington
2 have thrown up their hands, has indicated we do not know
3 what we have got, so you do what you can, so we have some-
4 thing in conflict with this careful process we have set up
5 over the years for the states to develop their own program.

6 Senator Muskie. My proposal is really geared to the
7 possibility that the permit program may live or that it may
8 die, and all I am suggesting here is that something that
9 ought to exist anyway, if it is dead or alive, and that is
10 a connection between the water quality standards approach,
11 and this permit approach, and the staff proposal here is
12 just I think over-complicated, tends to add to the confusion.

13 I may feel differently about it after I have had
14 a chance to digest it, and understand it, but that is my
15 impression of it now, so that when I am interested in trying
16 to develop the straightest, most direct kind of connection
17 between the two.

18 Mr. Jordan. As its own logic?

19 Senator Muskie. Yes, so that at such point, and it
20 seems to me that that connection must come at the point of
21 discharge, that is, at some point when somebody is going to
22 be told that they can discharge effluent of a certain
23 quality, there ought to be a procedure for insuring that
24 that discharge conforms both to the permit program, and to
25 the water quality standards program.

55 1 If you can achieve that result, then you have given
2 industry some kind of light, as to what is expected of
3 them, but if you have a procedure that may achieve a different
4 result at that point, because of two different and somewhat
5 parallel programs, there is confusion.

6 Now, if the permit program therefore is developed,
7 in spite of the gloom about its future, then you have got
8 a connection.

9 If it is not, you have not set up an elaborate
10 kind of concept that you would have to worry about.

11 It is pretty direct.

12 Now, you are going to have confusion before both
13 programs are fully matured and developed, because there
14 is a transition period with respect to both, but I just
15 do not see how you can conform the two transition periods, so
16 that they are meshed all the way along.

17 I do not see how you can do it.

18 With the permit program, you do not have any specified
19 timetables, no state input, it is wholly a Federal creature,
20 under the Corps of Engineers, I just do not see any way to
21 mesh it all along the way, and short of that, the important
22 point of which they ought to mesh is at the point where some-
23 body has told what they can discharge, and there ought to be
24 a connection at that point.

25 I do not like the period of transition. It is going

56 1 to be difficult enough if you had only one of the programs
2 to work out over a period of transition, but the two of
3 them are going to be more difficult.

4 It may be that I have oversimplified the whole
5 thing, but I am serious about this.

6 Senator Boggs. It sounds very good.

7 Mr. Billings. It sounds too simple.

8 Mr. Jorling. You would not even give the Federal
9 Government new direction on what it is they are going to
10 require to be controlled, just leave them go their own
11 devices?

12 Senator Muskie. On the permit program?

13 Mr. Jorling. We will not say you shall attach
14 or as was said earlier, you suggested there should be
15 three tests, and the highest test should apply, one the
16 65 requirements, the secondary equivalent test.

17 Senator Muskie. The trouble with that, in order
18 to make that thing work, you would have to have
19 effluent controls under each of the three alternatives,
20 and then under the water quality standard act, or the new
21 program.

22 You are going to be in a position of comparing
23 apples and oranges.

24 It would be very difficult to translate water
25 quality standards into effluent.

57 1 Mr. Billings. The staff comes to one point, and
2 it is at the point at which the state makes the decision
3 as to certification, and the standard that is the performance
4 standard that is imposed on the permit applicant as a
5 result of the Federal permit program, differs from that
6 which the state is certifying to, then the state is in a
7 position, A, of refusing to certify it, and go to deny
8 certification, which is easy, and that makes it criminal
9 under the Refuse Act of the discharger to discharge, or it
10 has to negotiate out with EPA what the conditions on the
11 discharger should be.

12 Would that be your interpretation?

13 Senator Muskie. Yes.

14 Mr. Billings. But in any event, the discharger
15 would be under the gun, until that dispute had been
16 settled.

17 Senator Muskie. That is right.

18 Mr. Billings. Now, if the state did not act to
19 deny certification, the discharger, to what would the
20 discharger respond, if the state did not actively deny,
21 at the same time did not certify?

22 Senator Muskie. The Federal Government then could
23 waive the certification.

24 Mr. Billings. So the waiver provision would continue.

25 Senator Muskie. That is right, and it would mean

58 1 something, because it would be triggered, not by present
2 circumstances, but by a decision of the Federal agency,
3 that this is what it was about to permit.

4 Mr. Billings. So if the state did not deny certi-
5 fication, and sat on its hands, then the Federal Government
6 would waive it, and its limitations would be imposed on
7 the discharger, so the discharger, at some point, assuming
8 about a year from the time of his application, the time
9 of his permit was turned over to the state for certifica-
10 tion, would know exactly what he would have to conform to.

11 Senator Boggs. Let's draft that.

12 Senator Muskie. I think it is a formula which we
13 are contemplating, and I offered it in all seriousness in
14 the first place, but we sort of got diverted by some
15 discussion, but I still think it is a viable, or is as viable
16 as any other alternative that has been offered, and this
17 business of trying to make it conform, all along the way, and
18 trying to beef up the permit program, substantively, it may
19 be all right, and I will read it, and study it, and try to
20 absorb what the staff has done, but I think it is an
21 over-complication.

22 Mr. Jorling. There are some things that would, first
23 of all, on the question, we have the Refuse Act Section
24 as it stands.

25 The reason I ask that question, is one of the things
that the staff drafted the revised and transfer Refuse

59 1 is the fact it brings under its scope municipal discharges and
2 storm and sanitary discharges, it brings within its scope
3 as well, we can easily take care of the ocean dumping.

4 Mr. Billings. If this is the suggested solution
5 to the problem of conflict between the Refuse Act permit
6 program, and the existing water quality standards program,
7 then I would assume the staff's next task would be to
8 develop a water quality standards program, which meet the
9 general outline that the Committee has suggested without
10 regard to this other thing, which was taken care of in this
11 procedure, in other words, to continue on, and what are
12 the next steps needed to develop a meaningful water quality
13 standards program, without regard to whatever may occur
14 under this program which may be dead or alive, or somewhere
15 in between.

16 Senator Muskie. I think even with this procedure,
17 somewhere along the transition, any place along, the dis-
18 charger is going to be at a loss to know how to conform with
19 what is happening to him under the two separate programs,
20 and all he can hope is that there is a place at which he
21 can conform at that point, the light will dawn.

22 Senator Boggs. It sounds reasonable to me, Mr.
23 Chairman.

24 Senator Muskie. And then as it goes along, in the
25 meantime, the Administration is in a better position to

60 1 conform the two.

2 They will be subject to pressures from industrial
3 polluters, and they will be subject to pressures from
4 state environmental agencies and it would be their problem
5 to work out the details of how you make sense out of it.

6 We cannot do it legislatively anyway.

7 You are trying to do an administrative job here,
8 trying to make these mesh at every point.

9 Senator Boggs. You cannot do it.

10 Senator Muskie. That is my viewpoint.

11 Well, shall we ask the staff to do that?

12 Senator Boggs. Yes.

13 Mr. Billings. It will be a lot easier, I can assure
14 you.

15 I assume it is the recommendation of the Committee
16 to respond to the Administration's request for authority to
17 transfer the program to EPA?

18 Senator Muskie. That is all right.

19 Now, this timetable, I don't know, has the staff
20 distributed this to each of you?

21 May I get your attention on this just a moment.
22 The staff tells me that this timetable, which incorporates
23 all of the periods for action, under the law as we have
24 developed up to this point, it has been checked at the
25

61 1 technical level of the Administration.

2 In other words, technically, I gather that you say
3 this is a feasible timetable.

4 Mr. Billings. It is "not wholly unreasonable".

5 Senator Muskie. The question it does not answer is
6 whether or not the Bureau of the Budget would be prepared
7 to complete the timetable, but maybe prior to the time that
8 the full Committee considers it, so I suggest that we
9 incorporate, that we not fool around with these variable
10 timetables, anymore in the Subcommittee, but incorporate
11 these into the Committee report, to the full Committee,
12 and that by that time, we urge the Administration to have
13 available for us by that time the OMB evaluation of this
14 timetable from the point of view of what it foresees in terms
15 of funding and staffing.

16 Mr. Billings. May I ask for permission to be able
17 to revise that timetable to take into account how we are
18 going to deal with the phasing problems between those
19 activities which are presently ongoing, and the national
20 water quality standard, which we had hoped to take advantage
21 of by the Rue Goldberg procedure, now the staff will have
22 to go back to the drawing board and slide those dates a little
23 bit in order to--

24 Senator Muskie. You will not advance them, I take
25 it.

They are pretty tight.

62 1 Mr. Billings. What we would do is we would try to
2 establish a mechanism to deal with the existing standards
3 and plans for interstate and intrastate waters, and then
4 establish a second phase planning and implementation
5 schedule for the national minimum standard which would
6 probably be a minimum deadline for existing plans.

7 Senator Muskie. Before we inadvertently get stuck
8 with March 28, 1980, please change it to another date.

9 Now, I think we have an all day Wednesday executive
10 session.

11 I would like to have the staff prepare for us for
12 tomorrow morning if possible a list of in as brief form
13 as possible of the issues we need to resolve on Wednesday,
14 if we are to report the bill out to the full Committee
15 by Wednesday night, and I would like that distributed to
16 the members of the Committee, so they can focus on it before
17 Wednesday, and remind us what it is we are going to do
18 on Wednesday, and I do not want to steamroller anybody,
19 but I think if in all good faith we are able to go through
20 that agenda, I have asked to develop, I think it would be
21 worth while.

22 The Committee stands in recess until Wednesday at
23 10:00 a.m.

24 (Whereupon, the Committee was recessed at 12:00 noon
25 until Wednesday, August 4, 1971, 10:00 a.m.)

